NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 05 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

SHENG BING HE and HUI XIN CHEN, aka Jun Yun Wang,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

No. 03-73213

Agency Nos. A76-282-319
A76-282-318

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted February 17, 2006
San Francisco, California

Before: WALLACE, HAWKINS, and THOMAS, Circuit Judges.

Sheng Bing He and Hui Xin Chen (collectively "Petitioners") appeal from the Board of Immigration Appeals' ("BIA") denial of their joint application for asylum.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The petitioners sought asylum based on their fear of future persecution arising out of China's coerced family planning regime. Part of their claim was based on their fear that a return to China would have risked the forced abortion of the couple's child, with which the wife was pregnant at the time of the applications and the IJ's decision. The BIA denied relief, reasoning in part that the child would have been born by the time the BIA considered her case, undermining her fear of future persecution.

When the BIA proposes to take judicial notice of individualized facts in reaching a decision on appeal, it must provide the petitioners notice of its intent and an opportunity to rebut the extra-record facts. *Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994). Here, the BIA denied relief in large part based on taking notice of extra-judicial facts that did not form part of the immigration judge's decision without affording the petitioners an opportunity to address the newly considered facts.

That a child has been born does not necessarily alter a fear of future persecution based on resistance to a coercive population control regime, particularly if the couple is planning to have another child or credibly fears sterilization upon return to China. *See In Re Y-T-L*, 23 I&N Dec. 601, 607 (BIA 2003) (recognizing forced abortion is capable of repetition); *see also Roe v. Wade*,

410 U.S. 113, 125 (1973) ("Pregnancy often comes more than once to the same woman. . . .").[1]

Because petitioners were not afforded an opportunity to address the BIA's new reasoning or its judicial notice of new facts, we must grant the petition for review and remand this case to the BIA for further proceedings.

PETITION GRANTED; REMANDED.

[1] The dissent argues that this issue is unexhausted because Chen's petition was purportedly limited to her then-existing pregnancy. This argument fails because such a narrow reading of her petition ignores the repetitive nature of pregnancy, and additionally because the BIA, by adopting this analysis without notice, did not give Chen the opportunity to clarify that she feared forced abortions of future pregnancies as well.